United States Courts
Southern District of Texas
FILED
DEC 20 2005
Michael N. Milby, Clerk of Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

THE UNITED STATES OF AMERICA *
*
VS. * CRIMINAL NO. C-05-00505-001
*
SEAN PATRICK GRAHAM *

DEFENDANT'S RESPONSE TO PRESENTENCE REPORT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the Defendant, **SEAN PATRICK GRAHAM,** by and through his undersigned counsel, and files the following sentencing recommendations in response to the Pre-Sentence Investigation Report (P.S.I.) dated December 5, 2005:

I.

OBJECTIONS

Defendant offers no objections to the guidelines as calculated in the above referenced P.S.I. Report.

II.

RESPONSE TO PART E. OF THE P.S.I. ENTITLED

"FACTORS THAT MAY WARRANT DEPARTURE"

A. The Defendant's criminal history is adequately represented at a Criminal History Category II, as calculated in P.S.I. Paragraph 29.

In Paragraph 65, the P.S.I. suggests Mr. Graham's criminal history may be under-represented, and therefore may be grounds for an upward departure.

The Sentencing Guidelines Commission specifically addressed the offenses that the probation officer relies upon to make the assertion an upward departure may be warranted, and the Commission specifically decided that those cases should not be considered or scored. (U.S.S.G. § 4A1.1). These offenses have already been taken into consideration by the Guidelines; they are not special or unusual, do not fall outside of the Guidelines' heartland, and therefore do not justify an upward departure. *Koon v. United States*, 518 U.S. 81 (1996); *United States v. Panadero*, 7 F.3d 81 (7th Cir. 1993).

The P.S.I. suggests an upward departure may be warranted based upon three Driving While Intoxicated offenses that were dismissed, however U.S.S.G. § 4A1.3 states that a "prior arrest record itself shall not be considered." Several courts have reversed departures that are based upon a Defendant's arrest record. *See e.g., United States v. Cantu-Dominguez*, 898 F.2d 968 (5th Cir. 1990); *United States v. Hernandez*, 160 F.3d 661 (11th Cir. 1998). Courts have permitted upward departures based upon dismissed charges when there has been a showing that the defendant was actually guilty of the offense that was dismissed. *See e.g., United States v. Russell*, 905 F.2d 1450 (10th Cir. 1990). There has been no such showing in the instant cause.

Additionally the P.S.I. lists six charges pending in State court against the Defendant as a basis for a possible upward departure. However, in *United States v. Short*, 4 F.3d 475 (7th Cir. 1993) the Court deemed departure inappropriate when based solely on pending charges against the defendant without any independent investigation that the charges are true.

B. Possession of a firearm by the Defendant was adequately reflected by the two offense level increase scored in P.S.I. Paragraph 13.

In Paragraph 66, the P.S.I. suggests that the two level increase did not adequately reflect the fact that twenty-eight firearms were recovered from the residence, and therefore an upward departure may be warranted.

The residence where said firearms were found belonged to Mr. Graham's ex-wife, Cheri Elmore. (See attached Affidavit). Mr. Graham did not live there, he was there visiting his ex-wife and daughter. The Defendant had owned a gun collection prior to being put on probation. Some of those guns were mementos of World War II that Mr. Graham inherited from his uncle. When the Defendant was placed upon probation, he gave his gun collection to his wife and daughter. Many of the firearms found in Cheri Elmore's residence belonged to her and her daughter. Most of the weapons were hunting rifles and shotguns stored in a patio closet storage. The Defendant has already been given a two level increase for possession of a firearm, any further upward departure on that basis would be unwarranted.

III.

SENTENCING RECOMMENDATION

Defendant respectfully requests a designation to the Bureau of Prisons' drug rehabilitation program, and to a facility near his home and family here in South Texas.

Respectfully Submitted,

SCOTT M. ELLISON
Federal Bar No. 17344

LAW OFFICE OF SCOTT M. ELLISON, P.L.L.C.
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ATTORNEY FOR DEFENDANT,
SEAN PATRICK GRAHAM

CERTIFICATE OF SERVICE

A true copy of the above and foregoing instrument was faxed to Robert Galvan, Assistant United States Attorney in charge of the above-styled and numbered cause, at (361) 888-3200, and to Bernadette Rojas Howard, United States Probation Officer, United States Probation Office, 1133 N. Shoreline Blvd., Corpus Christi, TX 78401 on this 20th day of December, 2005.

SCOTT M. ELLISON

CERTIFICATE OF CONSULTATION

I hereby certify that I have contacted Probation Officer Bernadette Rojas Howard and Assistant United States Attorney Robert Galvan, and they are aware of the above and foregoing sentencing recommendations.

SCOTT M. ELLISON

AFFIDAVIT

STATE OF TEXAS

COUNTY OF NUECES

BEFORE ME, a Notary Public, on this day personally appeard Cheri Lucille Elmore, being by me duly sworn on oath, deposes and states:

"My name is Cheri Lucille Elmore, Date of Birth: 11/13/67 and Social Security No.: 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.

I, Cheri Lucille Elmore do swear my ex-husband did not live at my address of 2410 Capitan #A, Corpus Christi, TEXAS 78414. I rent the townhouse. The lease has my name listed and my daughter, Cheri Lucille Elmore AND Kyra Graham. We occupy the residence at 2410 Capitan # A, Corpus Christi, Texas 78414. The firearms did not belong to SEAN PATRICK GRAHAM. The guns were given to me to sell to help me financially for living expenses for Kyra Graham AND myself.

"My name is Cheri Lucille Elmore, and states: ______________________

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Cheri Lucille Elmore
Affiant Signature

Cheri Lucille Elmore
Affiant Printed Name

SUBSCRIBED AND SWORN TO ME, on this the 20th day of December,

2005.

Liza M. Estrella
NOTARY PUBLIC, STATE OF TEXAS
MY COMMISSION EXPIRES: 9-14-06

LIZA M ESTRELLA
Notary Public
State of Texas
My Commission Expires
September 14, 2006

NOTARY PUBLIC STATE OF TEXAS